DOCKET FILE COPY ORIGINAL

RECEIVED

APR 2 1997

Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)))	CC Docket No. 96-149

AMERITECH COMMENTS

Gary L. Phillips
1401 H Street, NW
Suite 1020
Washington, DC 20005
(202) 326-3817

April 2, 1997

No. of Copies rec'd 0+11
List ABCDE

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)))	CC Docket No. 96-149

AMERITECH COMMENTS

I. INTRODUCTION AND SUMMARY

The Ameritech Operating Companies (Ameritech) respectfully submit the following comments in response to petitions for reconsideration of the First Report and Order (the Order) in the above-captioned proceeding, in which the Commission adopts rules to implement the non-accounting safeguards in section 272 of the Telecommunications Act of 1996 (the Act). In general, and except as indicated below, Ameritech believes that the Commission should affirm the Order. While Ameritech does not agree with it in its entirety, for the most part, the Commission has interpreted section 272 in a reasonable manner -- one that is faithful both to the text of the provision and sound public policy.

For this reason, Ameritech opposes the petitions for reconsideration of AT&T, MCI, TCG, and Time Warner. These petitions seek fundamental changes in the Order that cannot be reconciled with the words of the statute or Congress' overarching goal to establish a pro-competitive deregulatory national policy framework. In proposing what is essentially a re-write of section 272, they would upset the careful balance struck by Congress between the need to ensure that Bell Operating Company (BOC) affiliates do not have unfair advantages that could thwart competition and the simultaneous need to permit them a reasonable opportunity to participate fully and effectively in the competitive marketplace. The Commission should, therefore, reject those petitions.

Ameritech takes no position on the other reconsideration petitions, including those filed by other BOCs, with one exception: Ameritech supports US West's request for partial reconsideration of the Commission's construction of section 271(e)(1). Specifically, Ameritech urges the Commission to reverse its finding that section 271(e)(1) does not apply to joint marketing activity that takes place after an initial sale to the customer.

II. ARGUMENT

A. The Commission Should Affirm its Construction of the Section 272(b)(1)"Operate Independently" Requirement

Section 272(b)(1) of the Act requires that section 272 affiliates "shall operate independently from the Bell operating company[.]" In the Order, the Commission held that this provision precludes a BOC and its section 272 affiliate from jointly owning transmission and switching facilities used to provide local exchange and exchange access service, and the land and buildings where those facilities are located. The Commission also found that this provision prohibits: (i) a section 272 affiliate from performing operating, installation, and maintenance functions associated with the BOC's network facilities, and (ii) a BOC or affiliate, other than the section 272 affiliate itself, from performing operating, installation, or maintenance functions associated with the facilities that the section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated.[1]

AT&T and MCI argue that the Commission should have construed the "operate independently" requirement more expansively. AT&T asks that the Commission prohibit a BOC and its section 272 affiliate "from integrating functions such as marketing, sales, advertising, service design and development, product management, facilities planning, and other activities[.]"[2] MCI urges the Commission to add a host of restrictions that would effect a complete separation of all aspects of the business of the BOC and its section 272 affiliate. The various arguments they raise in support of these requests are addressed, in turn, below.

1. The Commission's Construction of "Operate Independently" is Well-Explained and Perfectly Consistent with Section 272(b)(1)

AT&T argues that the Commission's construction of "operate independently" is inconsistent with the "plain language" of that provision.[3] It argues, further, that, "[e]ven if the Order's interpretation of § 272(b)(1) were not inconsistent with the plain language of that section, the Commission failed to provide adequate reasons to support its reading."[4] Both arguments are devoid of merit.

---

1 Order at para. 158.

2 AT&T Petition at 2-3.

3 Id. at 3-4.

4 Id. at 4.

AT&T's argument that the Commission did not implement the plain language of the statute rests on the faulty premise that there is such a thing as a "plain meaning" of the words "operate independently." Contrary to AT&T's suggestion, the term "operate independently" is not a clearly defined term, and, at least on its face, is capable of a number of reasonable interpretations. Indeed, AT&T itself never quite gets a handle on exactly what operate independently "plainly" means. In one breath, it argues that the Commission must define operate independently with reference to section 274(b); in the next it concedes that the Commission is not bound to adopt precisely the same interpretation of operate independently in both sections 272 and 274.[5] Elsewhere in its petition, it faults the Commission for not following the cellular separation rules and the Computer II rules, in which the words "operate independently" have a different meaning than in section 274(b).[6] Finally, it proposes its own definition of "operate independently" that goes well beyond any of these other definitions insofar as it would prohibit integration of "marketing, sales, advertising, service design and development, product management, facilities planning, and other activities." The fact that AT&T itself suggests several different definitions of "operate independently" only demonstrates that there is no accepted definition. That being the case, AT&T's contention that the Commission failed to implement the plain meaning of "operate independently" is specious.

---

5 Compare id. at 6 with id. at 7. Of course, AT&T never explains precisely how the two interpretations should differ, which presumably it would have done if the meaning of the term were "plain," as it claims.

6 Id. at 8-10.

AT&T's argument that the Commission did not adequately explain its decision is equally specious. The Order makes clear that the Commission construed section 272(b)(1) as requiring independent <u>network</u> operations, but not completely separate businesses, as AT&T and others advocated. This is a perfectly reasonable construction of the words "operate independently" -- one that is not only consistent with the text of the statute, which, on its face is capable of a variety of interpretations, but which quite properly bridges that text with sound public policy. As the Commission explained:

> the prohibition we have adopted should ensure that the section 272 affiliate's competitors gain nondiscriminatory access to those transmission and switching facilities that both section 272 affiliates and their competitors may be unable to obtain from other sources. We find that joint ownership of other property, such as office space and equipment used for marketing or the provision of administrative services, may provide economies of scale and scope without creating the same potential for discrimination by the BOCs.[7]

The Commission also explained how the specific requirements it imposed ensure operational independence by creating structural barriers to discrimination by a BOC in the provision of access to network facilities. For example, the Commission noted that its prohibition on joint ownership of switching and transmission facilities would force section 272 affiliates to obtain services and facilities pursuant to armed length transactions on the same rates, terms, and conditions available to unaffiliated entities. It noted, in contrast, that an affiliate would not have to contract with a BOC to use facilities which the affiliate and the BOC jointly owned.[8] To be sure, this

---

7 Order at para. 162.

8 Id. at para. 160. The Commission also explained how construing "operational independence" with reference to switching and transmission facilities minimizes the risk of cross-subsidization. For example, the Commission pointed out that the costs of wired

same reasoning could be applied to non-network-related assets of the BOC, but the Commission reasonably concluded that these assets were of less concern because they are not so-called "bottleneck facilities" that are likely to be used by the affiliate's competitors and, indeed, on which the affiliate's competitors may depend.

For similar reasons, the Commission prohibited a BOC and its section 272 affiliate from performing for each other certain network-related services -- specifically operating functions, installation, and maintenance. As with the prohibition on jointly owned network facilities, the Commission targeted its rules to those activities that it believed posed the greatest risk of anti-competitive behavior -- namely, shared network operations and required strict separation of those functions. While AT&T may have preferred a different, more draconian outcome, the Commission's decision is not unexplained.

2. There is No Precedent To Which the Commission Was Bound, and the Commission Properly Found That Neither § 274 Nor the Computer II/Cellular Separation Rules Controls § 272(b)(1).

AT&T also argues that the Commission erred by failing to apply relevant precedent. In particular, it argues that the Commission should have defined section 272(b)(1) with reference to section 274(b) or the Computer II and cellular separation rules, all of which require "independent operations." It argues that the Commission did not explain its deviation from these precedents.

---

telephony networks tend to be largely fixed and largely shared among multiple services and that allocating the cost of such facilities can be particularly tricky. Id. at para. 159.

These arguments are just a variation of the AT&T argument, discussed above, that the Commission failed to implement the plain language of the statute. In refuting that argument, Ameritech showed that there is no "plain" meaning of the words operate independently, in part, because the term is used differently in different contexts. For this very same reason, there is no "precedent" that serves to define "operate independently" for purposes of section 272(b)(1): since operate independently has meant different things in different contexts, there is no single meaning of the words to which the Commission was bound.

Not only was the Commission under no obligation to treat section 274 or the Computer II/cellular separation rules as precedent in defining "operate independently," it was correct in concluding that neither set of rules offers a suitable model for defining section 272(b)(1). While AT&T claims that the Commission did not explain this conclusion, the Commission, in fact, provided ample explanation. For example, in rejecting section 274(b) as a blueprint for defining section 272(b)(1), the Commission stated: "We agree with SBC that, because the requirements listed in section 274(b)(1)-(9) of the Act overlap with the requirements of section 272(b), (c), and (e), it would be redundant to incorporate all of the section 274(b) requirements into the "operate independently" requirement of section 272(b)(1)."[9] In other words, construing "operate independently"to mean the same thing in sections 272(b)(1) and 274(b) would render sections 272(b)(2-5) meaningless and, therefore, violate the maxim that statutes must be construed, where possible,

---

9 Id. at 157. In arguing that the Commission did not explain its decision, AT&T completely ignores this passage. It quotes language that immediately precedes this passage and then faults the Commission for not elaborating on such language. The elaboration that AT&T claims was missing was missing only from the quote that AT&T chose, not from the Order itself.

so that no provision is rendered inoperative or superfluous.[10] The Commission's reasoning is sound and should be affirmed.

There are other reasons why section 274(b) does not provide an appropriate benchmark for construing section 272(b)(1). Apart from the structural differences between the two sections, which the Commission noted in the Order, there are important substantive differences. Most significant is that, while section 274 generally prohibits joint marketing, section 272 expressly permits it. Indeed, the legislative history of section 272(g) makes clear that Congress intended for that provision to establish "parity" between BOCs and their competitors in joint marketing opportunities.[11] This key difference between section 272 and 274 is reflected in the different separation requirements established in the two provisions: the requirements in section 274 contemplate only limited joint marketing, while the requirements in section 272 were designed to permit parity in joint marketing opportunities. Bootstrap section 274 separation requirements into section 272 would ignore the substantive differences between the two provisions and would preclude the parity in joint marketing opportunities that Congress intended to establish in section 272(g).

In any event, while AT&T purports to argue that section 274(b) defines "operate independently," the definition of "operate independently" that AT&T actually proposes does not, in fact, derive from section 274(b). Rather, AT&T's proposed restriction on joint "marketing, sales, advertising, service

---

10 *Mail Order Ass'n of America v. United States Postal Service,* 986 F.2d 509, 515 (D.C. Cir. 1993).

11 Report of the Committee on Commerce, Science, and Transportation on S. 652, S. Report 104-23, 104th Rep. 2d Sess. at 23.

design and development, product management, facilities planning, and other activities," is lifted right out of section 274(c) -- which is the provision that restricts joint marketing of local exchange and electronic publishing services. Not only is this provision directly at odds with section 272(g) -- and therefore inapplicable to section 272 affiliates -- it does not even include the words "operate independently."

Likewise, AT&T's contention that the Commission should have interpreted "operate independently" consistently with the Computer II rules should be rejected. As much as it pains AT&T, Congress did not codify the Computer II model -- and for good reason. The Computer II regime was established before the divestiture, before equal access, before price caps, before any interconnection obligations existed, and before, even, the Commission had promulgated Part 64 cost allocation rules. In that context, the risk of discrimination and cross-subsidization by the integrated Bell System against, what were at the time, fledgling competitors required stringent separation requirements. To apply these same rules today -- in a completely different regulatory and competitive environment -- would be overkill and completely at odds with the letter and spirit of the 1996 Act, the central purpose of which is to establish a "pro-competitive deregulatory" national policy framework.

Similarly, Congress did not adopt the cellular separation rules or in any way indicate that it intended for these rules to provide a model for section 272. In fact, the cellular separation rules could not define section 272(b)(1) for the very same reason that section 274(b) could not. In both cases, the approach would render much of section 272(b) redundant. Moreover, like section 274, the cellular separation rules prohibit joint marketing -- indeed, without even the exceptions provided for in section 274. Thus, the cellular separation rules are not a suitable model for defining "operate independently."

3. Section 272(b)(1) Does Not Require "Fully Separate Operations"

MCI argues that the Commission's construction of operate independently "will prevent the accomplishment of the stated goal of this proceeding, which was to implement Section 272 such that the BOCs cannot use their continuing local exchange monopoly power to discriminate against interexchange competitors and cross-subsidize their interLATA and other competitive services with local and access revenues."[12] Asserting that section 272(b)(1) requires a BOC and its section 272 affiliate to maintain "fully separate operations,"[13] it faults the Commission, in particular, for permitting, on a nondiscriminatory basis, shared administrative services, shared research and development, and shared product development.[14]

MCI's contention that the Act requires "fully separate operations" is wrong as a matter of law. First, the 1996 Act contains a series of provisions that specifically contemplate the very type of sharing that MCI claims it

---

12 MCI Petition at 9-10.

13 Id. at 9.

14 MCI also challenges the Commission's conclusion that nothing in the Act prohibits a section 272 affiliate from providing local exchange services. It asserts that "[i]f both the BOC and its separate affiliate are in the local exchange business, it will be impossible for them to operate independently or for the Commission to ascertain whether they are operating independently." Id. at 3-4. This argument is nonsensical. A BOC affiliate that purchases local exchange services for resale or network elements must purchase those services or elements pursuant to publicly filed agreements or statements, the terms of which are generally available. Such purchases no more involve the affiliate in the operations of the BOC, or vice versa, than would, for example, a purchase of access services by the affiliate from the BOC.

prohibits. For example, section 272(b)(5) requires that transactions between an interLATA affiliate and a BOC be "on an arm's length basis" and reduced to writing. Similarly, section 272(c)(1) prohibits BOCs from discriminating in their dealings with affiliates in the "procurement of goods, services, facilities and information, or in the establishment of standards[.]" These sections of the Act and others would be rendered meaningless if section 272(b)(1) required the type of "fully separate operations" MCI suggests.

Second, MCI's reading of section 272(b)(1) is inconsistent with section 272(b) itself. Section 272(b) contains five subparts. The first of these requires independent operations, the remaining four prescribe specific separations requirements. It is inconceivable that Congress could have intended to establish, through the undefined words "operate independently," a slew of additional structural separation requirements that dwarf the specified requirements in their breadth and scope. If Congress had intended to require "fully separate operations," it would have said so; it would not have left matters to the vagaries of interpreting the words "operate independently". Moreover, under MCI's reading of section 272(b)(1), sections 272(b)(2-5) would be completely redundant, since there would be no need to require, inter alia, separate books, records, and accounts, or separate officers, directors, and employees, if section 272(b)(1) already required fully separate operations.

A requirement that there be "fully separate operations" would also be incompatible with section 272(g). As noted above, the purpose of that provision was to provide for parity in joint marketing opportunities. Such parity would be impossible if the BOCs and their affiliates were required to maintain "fully separate operations," with no sharing, even on a nondiscriminatory basis, of any services. Under MCI's approach, the BOCs would be limited to the side-by-side marketing of stand-alone services, while competitors, such as MCI, would be able to design integrated solutions that much more effectively addressed customers' needs.

Significantly, while MCI faults the Commission for permitting too much integration and for ignoring the risk of cross-subsidization, MCI never explains exactly what "ills" could come from the Commission's decision -- other than the emergence of an efficient competitor. For example, MCI never explains precisely how, given price cap regulation, cost accounting rules, biannual audits, and the structural separation prescribed by the Act and the Commission's rules, the massive cross-subsidization that MCI posits could possibly occur, much less occur without detection. Nor does MCI explain how sharing of administrative services could in any way lead to undetected, unlawful discrimination. That is because, ultimately, MCI's petition is not about "safeguards" at all; rather, its aim is to secure competitive advantages in the regulatory arena through skewed rules that impose unnecessary costs on the BOCs and deny them the ability to design and market integrated service packages in an effective fashion.

B. Nothing in the Act Precludes a BOC Section 272 Affiliate From Providing Local Exchange Services

In the Order, the Commission concluded that section 272 does not prohibit a section 272 affiliate from providing local exchange services in addition to interLATA services, and that no such prohibition can be read into this section.[15] TCG, which had argued to the contrary in its comments, seeks

15 Order at para. 312.

reconsideration of this conclusion. It offers four arguments in support of its petition, none of which is new. The Commission was right to reject these arguments in the Order. It should do so again.

TCG argues, first, that the Commission "turns the 1996 Act on its head by allowing the RBOCs to evade the mandate that the RBOCs keep their interLATA and local exchange operations separate."[16] There is no mandate, however, that the RBOCs keep their interLATA and local exchange operations separate. Rather, as the Commission found, the separation requirements in the Act apply, quite specifically, to (i) a Bell operating company, or (ii) an affiliate subject to section 251(c). Thus, it is TCG, not the Commission, that would turn the Act on its head -- by expanding the scope of section 272(a) to affiliates to which it does not apply.

Apparently in recognition of the fact that its argument is not supported by the text of the statute, TCG falls back on what it characterizes as Congress' intent. It claims that the purpose of the separate subsidiary requirement is to prevent an RBOC from offering local and long-distance services through the same entity, and that the Commission ignored this intent. TCG's characterization of Congress' intent, however, is inaccurate. The purpose of the separate subsidiary requirement is not to separate local exchange and long-distance operations per se. It is to prevent the abuse of so-called "bottleneck control" of local exchange facilities. It is this "bottleneck control" of local exchange facilities that ostensibly differentiates the BOCs from other entities and makes possible the twin evils to which the separation requirements are directed: discrimination and cross-subsidization. That is

16 TCG Petition at 3.

why the separation requirements apply by their terms only to those entities that theoretically could possess bottleneck control -- the BOC itself and an affiliate of the BOC that is subject to section 251. It is also why, in three years, when any bottleneck control a BOC might now possess will have dissipated, the separation requirements will sunset, absent Commission action to the contrary. Because a BOC section 272 affiliate does not possess bottleneck control of any local exchange facilities, Congress did not intend to prevent that affiliate from providing both local exchange and long-distance services. TCG's argument to the contrary is specious.

TCG's second argument is that the Commission's decision will enable the BOCs to evade the nondiscrimination requirements of the Act in their dealings with their section 272 affiliates. Specifically, it argues that, by establishing multiple layers of affiliates, the BOCs will be able to conceal discrimination in favor of their affiliate, and it (rather cryptically) accuses Ameritech and other RBOCs of having established affiliates to that end.[17]

TCG raised this same argument in an October 8, 1996, ex parte letter. Its argument was disingenuous then, and it is no less so now. For one thing, TCG's suggestion that Ameritech has established "layers of unregulated affiliates" is a gross distortion of reality. Rather, as TCG is fully aware by virtue of its participation in state certification proceedings, Ameritech has established a single subsidiary of its long-distance affiliate, ACI, in two of its in-region states, Illinois and Wisconsin, as well as a third subsidiary that will provide out-of-region service. Moreover, as explained in an October 23, 1996, response to TCG's ex parte, Ameritech established these subsidiaries for the

17 TCG Petition at 4 .

sole purpose of facilitating accounting and auditing of its long-distance operations by state regulators. In fact, when TCG objected in the Illinois certification proceeding to the existence of the ACI subsidiary, Ameritech responded by indicating that it had no preference as to whether the Illinois Commerce Commission certified ACI or ACI of Illinois. ACI also informally made the same offer in Wisconsin. (As noted, notwithstanding these offers, both Illinois and Wisconsin chose to certify the state-specific subsidiary of ACI, rather than ACI itself). Finally, Ameritech will not, and could not, use these subsidiaries to evade the strictures of section 272, since Ameritech assumes that, in any in-region state in which a subsidiary of ACI has been certified, both the subsidiary and ACI are subject to section 272.

TCG argues, third, that the Commission erred in assuming that state statutes and regulations will adequately protect against discrimination. This argument distorts the Commission' decision. The Commission did not conclude that state requirements, in and of themselves, would protect against discrimination. Rather, the Commission found that these requirements, coupled with other safeguards, would protect against discrimination. The Commission held, for example, that if a BOC transfers network capabilities to its section 272 affiliate, that affiliate could be deemed a successor or assign of the BOC, which would subject it to section 251 and 272 requirements. The Commission also noted that, even those affiliates not deemed successors or assigns, would remain subject to section 202 of the Act -- which for 63 years has been the only nondiscrimination requirement applicable to interstate common carriers.[18] TCG provides no credible evidence that this provision, supplemented by any applicable state requirements, would be inadequate.

18 See Order at para. 311.

Indeed, it does not even purport to explain exactly how a section 272 affiliate that is not a successor or assign of a BOC could discriminate unlawfully against a competitor. If the affiliate has not been deemed a successor or assign of the BOC, it, by definition, would not have bottleneck control over essential local exchange facilities, and thus would not have any ability to engage in unlawful discrimination.

TCG's fourth and final argument is that the Commission erroneously concluded that allowing section 272 affiliate to offer local exchange services will encourage the development of innovative new services. It claims that, since the RBOC is prohibited from sharing facilities with the section 272 affiliate, the only innovative new services that may be expected to arise out of such a pairing would involve the bundling and packaging of services, which would be permitted even if the 272 affiliate were not, itself, providing local exchange services.

This is simply not true. A BOC affiliate that can offer its own local exchange product is likely to develop new, innovative service packages that would not be available if the affiliate were limited to the local exchange services and rate structures offered by the BOC itself. The affiliate might develop innovative pricing plans, for example, or target niche markets to which the BOC's offerings are not primarily directed. Moreover, as the Commission recognized in the Interconnection Order, carriers that purchase unbundled network elements, rather than services for resale, have even greater opportunities to create distinct new services.[19] In either case,

---

[19] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, at 15667-68 (1996).

assuming that BOC affiliates are treated as nondominant carriers, they would be able to provide bundled service packages on a more efficient, streamlined basis than if they were simply combining their own service with an off-the-shelf BOC service.

C. Quality Reporting Requirements are Unnecessary

MCI seeks reconsideration of the Commission's determination that quality reporting requirements are unnecessary. It asserts that the Section 272 report format proposed by the Commission in the Further Notice in this docket should incorporate specific service quality measures suggested in various MCI and AT&T ex parte letters. It argues that BOCs should be required to report, at a minimum, the failure frequency of local and exchange access circuits, local and exchange access service repeat troubles as a percentage of trouble reports, and the percentage of exchange access circuit failures within 30 days of installation.[20]

MCI's request should be rejected. First, to the extent MCI's petition relates to issues raised in the Further Notice, those issues are properly addressed in the context of that proceeding, not here. Second, to the extent MCI seeks reconsideration of conclusions in the Order, it offers no new evidence or arguments that would warrant a reversal of the Commission's decision.

As MCI acknowledges, the Commission's determination that quality reporting requirements are unnecessary was based on a litany of

---

20 MCI Petition at 10-15.

considerations.[21] For example, the Commission noted that the structural and transactional requirements of section 272(b), along with the biannual audit, and strict nondiscrimination requirements, should discourage and permit detection of any anticompetitive behavior. The Commission also pointed out that a BOC may not even provide in-region interLATA services until it has shown that "the requested authorization will be carried out in accordance with the requirements of section 272."[22] In addition, the Commission noted that "the section 272(b)(5) requirement that all transactions between a BOC and its section 272 affiliate be reduced to writing and made publicly available should serve as a powerful mechanism both to detect violations of the section 272 requirements and to deter anti competitive behavior."[23] Moreover, the Commission noted that there are a host of other disclosure requirements, including those adopted pursuant to sections 251(c)(5), 273(c)(1), and 273(c)(3), that "largely address the concerns cited by parties arguing for additional reporting requirements."[24] Finally, the Commission observed that, wholly apart from the requirements mandated under the 1996 Act, there are other avenues by which a telecommunications carrier may obtain information with regard to service standards and service quality.

MCI does not show that, given the myriad of requirements and other measures cited by the Commission, quality reporting is necessary to prevent discrimination in the quality of services provided by a BOC. While MCI purports to demonstrate that certain of these requirements, taken by

---

21 See generally Order at paras. 321-28.

22 Id. at para. 323, quoting 47 U.S.C. § 271(d)(3)(B).

23 Id. at para. 324.

24 Id. at para. 325.

themselves, do not offer protection against discrimination, it fails to address how, in concert, they are inadequate.

Ameritech submits that MCI's professed concerns about discrimination are wildly exaggerated. For one thing, given that AT&T, MCI, MFS, TCG, and others are already, or soon will be, providing their own local exchange and access services, it would be suicidal for a BOC to attempt to discriminate in the quality of access services it provides. That would only hasten the loss of business to competitors. Moreover, from an engineering perspective, it would be virtually impossible for a BOC to engage, without detection, in systematic discrimination based on service quality. In contrast to pre-divestiture practice, the assigning and provisioning of local exchange and access facilities is almost totally automated, and circuit components are assigned based on one factor only: whether the components meet the technical requirements of the service. Moreover, these systems do not contain information on the relative quality of facilities in inventory, only standard facility descriptions and codings that indicate whether facilities meet particular tariffed parameters. Significantly, it was these very same factors that led the Commission to conclude in 1988 that AT&T lacked the ability to discriminate in the quality of services it provided to competing enhanced service providers.[25] The Commission's reasoning is equally valid today.

Further, the contractual interconnection obligations that Ameritech has undertaken pursuant to both Section 252 negotiations and arbitrations, require it to provide network interconnection, unbundled network elements,

---

25 See Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 3 FCC Rcd 1150 (1988) at para. 68; Filing and Review of Open Network Architecture Plans, FCC 88-383, released December 22, 1988, at paras. 61-62.

resold services, local transport and termination, collocation, and access to rights-of-way on the same terms and conditions to all carriers, including the incumbent long distance carriers, and, significantly, on the same terms and conditions that it provides to itself <u>and its affiliates.</u> In this regard, MCI's claim that interconnection agreements ensure equality only between the BOC and its local service competitors is wrong. Moreover, these agreements embody concrete, detailed performance standards and benchmarks for measuring Ameritech's compliance with its contractual obligations and impose penalties for noncompliance. They also require Ameritech to maintain performance records and to generate monthly reports that enable competing carriers, as well as regulatory authorities, to monitor Ameritech's compliance with these standards and benchmarks.

In addition to these reports relating to interconnection, Ameritech provides detailed monthly reports on access services to its largest access customers, including MCI. These reports, which vary somewhat based on customers' individual needs, contain quality of service information, including, <u>inter alia</u>, 30-day circuit failure rate, failure frequency, and network repeat failures -- the very information that MCI argues should be included in a Commission-mandated reporting requirement. These carriers also employ automatic test equipment and performance monitoring devices that would immediately detect any degradation in service.

MCI seems to argue that FCC-imposed reporting requirements are nevertheless necessary so that MCI can compare its own service quality with that provided to BOC long-distance affiliates. Such direct comparisons, though, are not necessary to prevent and reveal service quality discrimination. MCI has ample means at its disposal already to protect itself against discrimination. Most importantly, MCI can engage in extensive benchmarking with respect to service quality. Not only can MCI compare the performance of one BOC with the others, it can also compare a single BOC's performance before and after long-distance entry. This benchmarking will enable MCI to identify any degradation in quality of access services it receives, even without formal service quality reports.

In short, MCI does not show that there is any need for mandated quality reporting at this time. Given the extensive reporting and other regulatory requirements to which BOCs are already subject, such reports would impose needless additional burdens without countervailing benefits. MCI's request should be rejected.

D. BOCs Are Not Required to Provide Video Programming Services Through a Separate Affiliate

Time Warner asks the Commission to clarify that BOCs must provide video programming services through a separate affiliate. It argues that section 272(a)(2)(B)(i) exempts from the separate subsidiary requirement only the transmission service underlying a video programming service, and not the video programming service itself. It claims that the video programming service is therefore to be treated just as any other non-electronic publishing information service under section 272(a)(2)(C).

Time Warner's argument is flawed in at least two key respects. First, video programming services are not information services, and are thus not subject to section 272(a)(2)(C). Therefore, while it may be true that Section 272(a)(2)(B)(i) addresses only the interLATA transmissions incidental to, inter alia, video programming, it is only this aspect of a video programming service -- the interLATA transmission -- that could potentially trigger a separate subsidiary requirement in the first place. Apart from any interLATA transmission, video programming services are outside the scope of section 272.

The Act defines "information service" as: "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . ."[26] For at least two reasons, video programming services do not fit this definition. First, they do not offer "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information. . . " Rather, a video programming service -- at least as the term seems to be used by Time Warner -- may be nothing more than a package of video programs selected by the programmer. Second, video programming services are not provided via telecommunications. The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[27] The transmission of video programming is not the transmission of information of the user's choosing, but, rather, of the video service provider's choosing.

In fact, Time Warner has already conceded that video programming services are not information services. In its August 15, 1996, Comments in this docket, it stated: "Of critical competitive significance to Time Warner is

---

[26] 47 U.S.C. § 153(20).

[27] 47 U.S.C. § 153(43).

the fact that both information services and electronic publishing services are likely to be jointly produced, distributed, and/or marketed with a third set of services: video programming."[28] Having conceded that video programming services constitute "a third set of services," Time Warner lacks credibility in arguing to the contrary now.

The second reason why Time Warner's argument must be rejected is that it is inconsistent with the definition of an interLATA information service. Even assuming arguendo that video programming services are information services -- which they are not -- it is only interLATA information services that are subject to section 272. The Commission has defined an interLATA information service, however, as "an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component."[29] Since the interLATA transmission component of an interLATA information service is thus, by definition, a necessary, bundled feature of the offering, the exemption from section 272 for incidental interLATA services could not possibly apply to one aspect of the offering (the interLATA transmission component), but not the other (the bundled video programming component). The effect of such a reading would be to eviscerate altogether that exemption.

Nor is there any public policy reason to subject video programming services to a separate affiliate requirement. The Commission has already ruled that open video systems need not be provided through a separate affiliate, and there is even less reason to subject cable service to a separate

---

28 Time Warner Comments at 28-29.

29 Order at para. 115.